

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK HARRIS,

No. C-08-0315 MMC

Plaintiff,

ORDER OF REMAND

v.

UNITED PARCEL SERVICE, INC., et al.,

Defendants.

Before the Court is the stipulation, filed February 13, 2008 by plaintiff Mark Harris and defendant United Parcel Service, Inc. ("UPS"), to stay the above-titled action pending the California Supreme Court's resolution of the issue of whether an individual supervisor may be held personally liable to an employee, under the California Fair Employment and Housing Act ("FEHA"), for retaliation.

Removal jurisdiction in the instant case is based on diversity of citizenship; in particular, defendant UPS asserts that two of the named defendants, both of whom are supervisors and alleged to be citizens of the state of California, are fraudulently joined.

"Joinder of a non-diverse defendant is deemed fraudulent, and the defendant's presence in the lawsuit is ignored for purposes of diversity, [i]f the plaintiff fails to state a

1 cause of action against [such] defendant, and the failure is obvious according to the settled
 2 rules of the state." Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001)
 3 (internal quotation and citation omitted). The propriety of removal jurisdiction is determined
 4 as of the time the complaint is filed and the time of removal. See Strotek Corp. v. Air
 5 Transport Ass'n of America, 300 F.3d 1129, 1131 (9th Cir. 2002).

6 Here, both at the time the complaint was filed and at the time of removal, there was
 7 no settled rule precluding a finding, under FEHA, of personal liability against a supervisor
 8 for retaliation. Compare Jones v. Lodge at Torrey Pines P'ship, 147 Cal.App.4th 475, 504
 9 (2007) (holding individual supervisor can be held liable for retaliation under FEHA), with
 10 Reno v. Baird, 18 Cal.4th 640, 663 (1998) (holding "individuals who do not themselves
 11 qualify as employers may not be sued under the FEHA for alleged discriminatory acts");
 12 see Winarto v. Toshiba America Electronics Components, Inc., 274 F.3d 1276, 1288 (9th
 13 Cir. 2001) (holding individual supervisor may be held personally liable for retaliation under
 14 FEHA).¹ Indeed, the parties' stipulation, by its very nature, makes the point as well.

15 Subject matter jurisdiction is not subject to stipulation or waiver, see, e.g., Bender v.
 16 Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (holding parties' stipulation can
 17 not confer subject matter jurisdiction), and, "[i]f at any time before final judgment it appears
 18 that the district court lacks subject matter jurisdiction, the case shall be remanded," see 28
 19 U.S.C. § 1447(c); see also Maniar v. FDIC, 979 F.2d 782, 785 (9th Cir. 1992) (finding
 20 § 1447(c) permits district court to remand sua sponte).

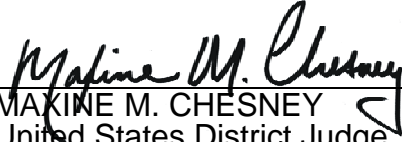
21 Accordingly, there being no dispute that the law is unsettled with respect to a
 22 supervisor's liability for retaliation under FEHA, the Court finds the joinder of the non-

23
 24 ¹ Contrary to UPS's assertion in its notice of removal, UPS has failed to show the
 25 allegations in the complaint are insufficient to state a claim against plaintiffs' supervisors for
 26 retaliation under FEHA, let alone that plaintiff could not, if necessary, augment such
 27 allegations to state such a claim. (See Compl. ¶¶ 10, 11 (alleging retaliation by
 28 defendants, under FEHA, based on plaintiff's use of UPS's grievance procedures in
 connection with plaintiff's request for "disability" accommodation); id. ¶¶ 23, 24
 (incorporating prior paragraphs by reference and alleging termination by "[d]efendants" in
 retaliation for "exercise of . . . lawful rights"); see also Cal. Code Civ. Proc. § 452
 (providing allegations in complaint "must be liberally construed"); Fed. R. Civ. P. 8
 (requiring "short and plain statement" of claim).

1 diverse defendants is not fraudulent and hereby REMANDS the above-titled action to the
2 California Superior Court, for the County of Alameda, pursuant to 28 U.S.C. § 1447(c).

3 **IT IS SO ORDERED.**

4 Dated: February 22, 2008


5 MAKINE M. CHESNEY
6 United States District Judge
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